character of the obligation is concerned, no substantial difference can be found between the right to compensation for the wrongful breach of a self-imposed contract duty, and the wrongful breach of a duty imposed by law not to commit a tort. The consequent unfairness of preferring a volunteer distributee over an injured party who may have been materially impoverished by the tort is obvious.[15]

The court distinguishes the principal case because the wrongdoer died before the plaintiff was injured. The reasoning seems to be that, where the deceased may project his personality after death sufficiently to commit a *post mortem* tort, justice requires a corresponding extension to make the estate liable. The argument is re-enforced by the fact that the estate of the deceased, as administered to-day, partakes of many of the features of an entity continuing the personality of the deceased. The result, however desirable, seems hard to support on common-law principles as historically developed. If no tort is committed till after death, there is then no tortfeasor to punish. Since the common law conceives of death as extinguishing pre-existing tort liability, *a fortiori* the impossibility of affixing a subsequently arising liability would seem to follow. And if the wrong occurred during the tortfeasor's life, the cause of action falls within none of the anomalous common-law exceptions which survive.[16]

ENJOINING CRIMINAL PROSECUTIONS AGAINST THIRD PARTIES. — It is clear that there are certain property interests for harm to which the law gives a remedy under some circumstances, while under other circumstances no remedy is given for reasons of policy in that it would unduly limit general freedom of action. These are surely interests recognized as rights by the law and under its protection. For equity to give a remedy for infringement of such legal rights would be, therefore, an exercise of concurrent jurisdiction as opposed to exclusive jurisdiction where equity protects interests not recognized by the law, as for example the interest of a *cestui*. It is submitted that equity has jurisdiction to give a remedy for infringement of such legal rights where the law gives no remedy, as well as where the law grants merely an inadequate one, and that it may exercise it if the reasons of policy preventing a legal remedy would not apply to an equitable one.

For example, suppose that a life tenant, without impeachment of waste, tears down buildings. The law gives no remedy to the remainderman for the injury to his interest, but equity will grant him an injunction.[1] Yet the remainderman's interest is legal, and he has a legal right to have it unimpaired. This is shown by the fact that he could sue an outsider for a trespass which injured it.[2] The truth must be,

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[15] See discussion, see SALMOND, TORTS, 2 ed., 65.

[16] That the gravamen of the wrong is injury to the feelings seems to be considered a special ground for the abatement of the cause of action. Thus recovery was denied in a suit for breach of promise although the action is closely akin to contract. Finlay *v.* Chirney, 20 Q. B. D. 494.

[1] Vane *v.* Barnard, 2 Vern. 738; Rolt *v.* Somerville, 2 Eq. Cas. Abr. 759, pl. 8; Aston *v.* Aston, 1 Ves. 264.

[2] Shortle *v.* Terre Haute, etc. R. Co., 131 Ind. 338, 30 N. E. 1084.

therefore, that, while the law recognizes the interest, it refuses to protect it in the particular circumstance because of some policy peculiar to its forum, — in this instance because the law sticks to the form of the words "without impeachment of waste," and refuses to recognize that they were inserted merely to protect the life tenant against a forfeiture of his estate and not to permit him to injure wantonly the estate of another.[3] Another instance of this jurisdiction is where equity removes clouds upon title. For in most jurisdictions the ground of relief is not that equity is enabling the defendant to defend himself in the equitable forum because his legal defense is inadequate. It is that equity is affirmatively protecting the *jus disponendi* of property from injuries for which the law affords no remedy whatsoever.[4]

An analogous situation existed in a recent case in which, however, equity refused to act. Because of threatened criminal prosecutions under a statute alleged to be unconstitutional, customers of the plaintiff, a dairy company, were deterred from shipping to it, and the railroad was afraid to accept any such shipment. Although the plaintiff had no way to test its rights at law, and its business was being destroyed, equity refused to enjoin the prosecutions. *Milton Dairy Co.* v. *Great Northern R. Co.*, 144 N. W. 764 (Minn.). Since the plaintiff sought to work out his remedy *via* an injunction against the prosecutions, two questions are involved: first, whether equity has jurisdiction, and second, whether it will exercise it by enjoining a criminal prosecution.[5] So far as the latter question is concerned, this would seem to be one of the exceptional cases where equity might grant such a remedy, since the question is entirely one of law, thus meeting the objection that the parties have a right to a jury trial; and irreparable damage to property is threatened if equity does not act.[6] The main question is whether the injury to the plaintiff's interest is one which equity has jurisdiction to redress. The interest for which protection is asked is a business, or, in general, trade relations. This is a legal interest [7] and therefore if equity acts it will be exercising its concurrent jurisdiction. Now in the exercise of its con-

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[3] LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 13 HARV. L. REV. 671.

[4] Gage *v.* Rohrback, 56 Ill. 262; Gage *v.* Billings, 56 Ill. 268; Sullivan *v.* Finnegan, 101 Mass. 447; Clouston *v.* Shearer, 99 Mass. 209.

[5] It is commonly said that equity will not enjoin a criminal prosecution. 1 HIGH ON INJUNCTIONS, 4 ed., § 68; see 23 HARV. L. REV., 469; *In re* Sawyer, 124 U. S. 200, 210, 211; Predigested Food Co. *v.* McNeal, 1 Oh. N. P. 266. It is also said equity will not enjoin the commission of a crime. Both these statements are true, broadly speaking, since equity has no jurisdiction to enjoin either a crime or a criminal prosecution as such, but if an incidental injury to property appears, the lack of jurisdiction is remedied. Clark *v.* Breeders' Ass'n, 85 Atl. (Md.) 503.

[6] An injunction will be granted: (*a*) where the matter has already been adjudicated at law in a suit between the same parties, Block *v.* Crockett, 61 W. Va. 421, 56 S. E. 826; (*b*) where the main question is one of law and equity has jurisdiction because of multiplicity of suits, City of Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 987: or irreparable injury to property is threatened, Coal & Coke Ry. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613; (*c*) where the prosecutions are in an inferior court from which there is no appeal, Shinkle *v.* City of Covington, 83 Ky. 420. These situations all present aspects of the inadequacy of the remedy at law.

[7] Casey *v.* Cincinnati Typo. Union No. 3, 45 Fed. 135; Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Tarleton *v.* McGauley, 1 Peake, 270.

current jurisdiction, the rule of equity is to follow the law. This means that in general it protects those rights for which a remedy is given by the law. In the principal case, however, though the law gives a remedy for such damage when caused by other means, it gives none when caused by a prosecution.[8] But a prosecution under an unconstitutional statute is, loosely speaking, a wrong, since on theory an unconstitutional statute does not exist and furnishes no justification for acts done under its apparent authority.[9] The policy of the law in favor of fearless prosecution of criminals and safe and easy recourse to tribunals of justice has confined legal remedies for baseless suits within the strict limits of the action of malicious prosecution. But equity may act preventively in this instance without violating this policy of the law at all. Therefore, as the interest which is threatened is one which under many circumstances equity protects,[10] it is submitted that an injunction should not be denied merely because a policy necessitated by the peculiar legal situation prevents the injury in this instance from being a technical tort.[11]

VOLUNTARY AND INVOLUNTARY SALES OF GOOD WILL. — "A person, not a lawyer, would not imagine that when the good will and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors and draw off all the customers." [1] Nevertheless, in the absence of express stipulations to the contrary, this is permitted by the great weight of authority.[2] What then is the good will which is sold? Good will may be said to be that advantage which is inherent in an established business over and above the actual property employed. It includes "the probability that the old customers will resort to the old place," [3] and the advantages from custom or business connection,[4] em-

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[8] Smith *v.* Adams, 27 Tex. 28.

[9] Dodge *v.* Woolsey, 6 McLean (U. S.) 142, Fed. Cases 18,033; Osborn *v.* Bank, 9 Wheat. (U. S.) 738; Southern Express Co. *v.* Rose, 124 Ga. 581, 53 S. E. 185.

[10] 1 HIGH ON INJUNCTIONS, 4 ed., § 1415e; Barr *v.* Essex Trades Council, *supra*; Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553; Hawardon *v.* Youghiogheny & Lehigh Coal Co., 11 Wis. 545, 87 N. W. 472.

[11] It is often said that one cannot enjoin a suit to which he is not a party. New York *v.* Conn., 4 Dall. (U. S.) 1. But on many occasions such injunctions have been issued. In McCullough *v.* Absecom Co., 10 Atl. (N. J.) 606, the petitioner in a suit to quiet title was allowed to enjoin a partition suit pending as to the same land. In Fisher *v.* Lord, 9 Fed. Cases 4,821, petitioner was allowed to enjoin a suit on a note he claimed to own. In *In re* Walker, 123 Pa. 381, petitioner was allowed to enjoin a suit to enforce a title to stock which he claimed to own. In Sumner *v.* Marcy, 3 Woodb. & M. (Fed.) 105, a stockholder was allowed to enjoin a judgment against the corporation which would subject him to a statutory liability.

[1] Plumer, V. C., in Harrison *v.* Gardner, 2 Madd. 198, 219.

[2] Cruttwell *v.* Lye, 17 Ves. 335; *In re* David (1899), 1 Ch. 378; Basset *v.* Percival, 5 Allen (Mass.) 345; Smith *v.* Gibbs, 44 N. H. 335; Von Bremen *v.* MacMonnies, 200 N. Y. 41, 93 N. E. 186; White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862; Zanturjian *v.* Boornazian, 25 R. I. 151, 55 Atl. 199. See HOPKINS, UNFAIR TRADE, § 84; 1 COLLYER, PARTNERSHIP, 6 ed., 571.

[3] Lord Eldon in Cruttwell *v.* Lye, *supra*, p. 346.

[4] See Trego *v.* Hunt, [1896] A. C. 7, 19; STORY, PARTNERSHIP, § 99; ALLEN, GOOD WILL, 8.